Accordingly, under O. 56 r. 2(2), I set aside my order of 23 July 1992 and dismissed the plaintiffs' appeal. I affirmed the order of the Senior Assistant Registrar who dismissed the plaintiffs' application for summary judgment. The plaintiffs are to pay the costs of the hearing before me and the Senior Assistant Registrar. I would like to make it clear that, at this interlocutory stage of the proceedings, I have not formed, and ought not to form, any opinion on the merit or final outcome of the case of either party, as this can only be decided at the end of the trial.

DABAL B. ANDING @ DABAL B. DHARU

v.

PUBLIC PROSECUTOR

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL APPPEAL NO. T(42) - 11 OF 1993]
16 MARCH 1994

CRIMINAL APPEAL: Outraging modesty - Penal Code s. 354 - Charge for single offence - Magistrate made a finding of fact that five similar offences committed by accused - Accused convicted - Whether conviction proper - Whether trial resulted in miscarriage of justice - Magistrate visited scene of crime after close of case - Conclusion of facts against accused made from observation at scene of crime - Whether accused prejudiced.

This was an appeal by the appellant against his conviction on a charge under s. 354 of the Penal Code. The appellant was a teacher at Sekolah Rendah Tanjong Batu Darat, Tawau, Sabah and the charge against him was that between January 1991 and July 1991, between 7.15 a.m and 5.45 p.m, at the said school, he used criminal force on one eight year old student girl with intention to outrage her modesty. The charge did not specify the exact location in the school where the offence was alleged to have been committed.

At the trial it was put in evidence that the appellant had also outraged the modesty of the child once at the appellant's house. Evidence was further led that three other such incidents within the school compound had taken place involving the appellant and the child. In her judgement the learned Magistrate made a finding of fact that all five incidents,including the one in the house, took place as alleged and went on to record a conviction based on that finding.

The facts further showed that after the close of the case, the learned Magistrate visited the school and from observations she made there, came to a finding that she disbelieved the story of the appellant with respect to the visibility of the library and the classroom to people in nearby locations.

The question was whether the trial had occasioned a miscarriage of justice and hence whether the conviction of the appellant could stand.

Held:

[1] As the charge was in respect of only one distinct offence it was wrong for the learned Magistrate to convict the appellant on all five offences. Even if it could be argued that the conviction was not for the offence committed in the house, for which the accused had not been charged, the evidence relating thereto had weighed very heavily on the mind of the learned Magistrate to the prejudice of the accused.

[2] The learned Magistrate should not have acted on her own private knowledge regarding the facts of the case under trial and it was wrong of her to privately investigate the scene of the alleged crime after the close of the case and to thereafter make conclusion of facts based on observation she made at the scene.

[3] The provisions governing the evidence of a child are s. 118 and s. 133A of the Evidence Act 1950 and in Sabah, these have to be read with the Oaths Ordinance (Cap. 89) of Sabah. This has the effect that when a child is allowed to give evidence not on oath or affirmation, the Court must caution the child "to speak the truth, the whole truth and nothing but the truth".

[Conviction and sentence quashed. Appellant ordered to stand retrial on three amended charges].

Cases referred to:
Wong Kok Wah v. R [1955] MLJ 46 ***(cit)***
Habee Bur Rahman v. PP [1971] 2 MLJ 194 ***(cit)***
PP v. Ong Kok Tan [1969] 1 MLJ 118 ***(cit)***
Kee Lik Tian v. PP [1984] 1 MLJ 306 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 164(i)
Evidence Act 1950, ss. 118, 133A
Oaths Ordinance (Cap. 89) of Sabah
Penal Code, s. 354

Other sources referred to:
Phipson on Evidence, 14th Edn., para 2-08

For the appellant - Mirdin Mamdin; M/s. Chin Mirdin & Co.
For the respondent - Mr. Zahir Hussein Ahmad Shah, DPP

JUDGMENT

Ian H.C. Chin J:

The Charge

This is an appeal by Dabal B. Anding ("the accused") who was on 26 July 1993 convicted by the learned Magistrate of having used criminal force on one eight year old girl ("the child") with the intention of outraging her modesty under s. 354 of the Penal Code and was sentenced to a term of imprisonment of 18 months. The charge against him was that he between January 1991 and July 1991, between 7.15 a.m. and 5.45 p.m. in Sekolah Rendah Tanjong Batu Darat, Tawau, used criminal force on the child intending thereby to outrage her modesty. The charge reads:

> Bahawa anda, antara bulan Januari 1991 hingga bulan Julai 1991, antara jam 7.15 pagi hinggi 5.45 petang sepanjang tempoh tersebut bertempat di dalam Sekolah Rendah Tanjong Batu Darat, dalam Daerah Tawau, di dalam Negeri Sabah. telah menggunakan kekerasan jenayah kepada Siti Salwa Bte Kamil, seorang gadis berumur 8 tahun, dengan niat mencabul yang boleh dihukum di bawah Seksyen 354 Kanun Kesiksaan.

The Evidence

The evidence of the prosecution are these. The mother of Siti Salwa Bte Kamil ("the child") testified that on 16 July 1991 at about 9.30 a.m. the child came home with 5 school friends. She heard one of the children said: "Makcik, si Salwa selalu kena tangkap basah oleh cikgunya", which, translated literally, means -"Aunty, Salwa is always caught wet by her teacher". She then tried to find out what the statement meant. This resulted in one of the school friends saying that the child was often called by the teacher into his room. Following further questioning, the child then told the mother that the accused pulled her panty down, that the accused asked her to lie on the floor and that thereafter the accused laid on top of her. One or two of the school friends then said that the accused also passed urine on the child which the child confirmed to the mother to be true. The mother made a police report on 17 July 1991.

The child testified that the accused asked her to remain in the classroom while the rest of her classmates were sent away to the padang for their physical education. When the accused and the child were alone, the accused locked the door of the class room, lifted the child onto a teacher's table and laid the child on it. The accused removed the panty of the child and unzipped his trousers fly. The accused thereafter took out his private parts, laid on top of the child and brushed his private parts against the private part of the child. The accused then ejaculated the sperm to

the side of the private part of the child. This happened 5 times. The first of which took place in the class room and this was in the afternoon during the time which the child was supposed to have her physical education and which the accused was supposed to teach. The second, third and fourth time was in the school library where the time and the day was not ascertained. The fifth time took place during a school period and in the accused's house where the child was brought there in a van by the accused. The sperm on the child was wiped with pages from a book. It was because her three classmates complained that she smelt of urine that she related to them what the accused did to her. She and her classmates on one occasion went to the toilet to wash away the sperm.

The next witness ("PW3") to testify was a 9 year-old classmate of the child and the class monitor of which the accused was the teacher. PW3 confirmed that the child had explained to her and other classmates as to why she (the child) smelt of urine and this was because, the child had said to her, the accused had laid on her and then urinated on her. PW3 testified that she, other classmates and the child went to a toilet to help clean the clothes of the child and this was when she saw a sticky white substance on the child's clothes which PW3 described as urine. She said it was during the time of the mathematic class which the accused was supposed to teach, but did not, that she saw the child and the accused went into the van of the accused and that they thereafter returned.

One other relevant witness was one Dr. Darshan Singh who examined the child on 17 July 1991. The said doctor's medical report was read in Court but the notes of proceeding do not show what the report stated and neither was the medical report produced though reference was made to it by the prosecution, the defence and the learned Magistrate. It is from these references and the answers elicited from the doctor when being examined as a witness that it could be guessed that the doctor had testified that the hymen of the child showed abrasions which were possibly caused by the rubbing together of two sexual organs. It was upon those evidence that I had just summarised that the accused was called upon to enter upon his defence.

The accused testified and denied the alllegations. He testified that the class room where he was alleged to have committed the act could be seen by anyone who happened to be at the verandah and by anyone at certain building away from the class room. He produced similar evidence with regards to the library where three of the acts were alleged to have taken place. A relative came forward to testify that she was at all time in the house of the accused and that she had never seen the accused brought any school girl home. Evidence was also produced that the children of the accused, who lived with the accused, attended morning and afternoon school.

More of the facts will be stated when the grounds of the decision of the learned Magistrate is hereinafter referred to.

Grounds of Appeal

Mr. Mirdin Mamdin, Counsel for the accused, both at the trial and in this appeal, had forwarded numerous grounds of appeal which I will not set out but I would have in this judgment dealt with them even if no pointed reference is made.

Conclusions

Since one distinct offence should be the subject-matter of one charge and since there is only one charge in this case, the accused must be taken to have been charged with one offence of using criminal force on the child to outrage her modesty. The charge related the school as being the place where the offence was alleged to have been committed. Though the charge was not more specific as to the exact location in the school where the offence was alleged to have been committed, there was no complaint at the trial, nor at the appeal, by Mr. Mirdin Mamdin, a Counsel of experience in criminal cases. I can conclude, therefore, that the accused was not misled, prejudiced or embarassed since his Counsel was happy with the charge as it is. Though there was one charge for one offence, evidence was adduced, again without any objection from Mr. Mirdin Mamdin, tending to show that the accused had on five different occasions committed similar act at the school library (three times), at the classroom and in the house of the accused. It ought to be observed that s. 164(i) of the Criminal Procedure Code allows not more than three similar offences to be charged and tried together; the section reads:

> 164(i) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect

> of the same person or not, he may be charged with and tried at one trial for any number of them not exceeding three.

Therefore, at most, the accused could only have been charged and tried at one trial with three of the alleged offences. Mr. Mirdin Mamdin's attack was directed at the evidence of the alleged offence committed in the house of the accused which was not even the subject-matter of the charge. It has first to be ascertained whether the learned Magistrate convicted the accused of the offence in the house or of the other four offences in the school library and the class room. In her judgment, the learned Magistrate made a finding of fact that all 5 incidents, including that in the house, took place as alleged by the child. The conviction of the accused, it could be argued, was for the offence committed in the house of the accused for which he was not even charged for. The problem with this case is that the conviction handed down by the learned Magistrate was in fact in respect of all five offences even though the accused was charged for only one offence. Even if it could be argued that the conviction was not for the offence in the house, the evidence relating thereto had, nevertheless, weighed very heavily on the mind of the learned Magistrate to the prejudice of the accused because such evidence tend to suggest that the accused had a propensity for such offence. See *Wong Kok Wah v R* [1955] MLJ 46; *Habee Bur Rahman v PP* [1971] 2 MLJ 194 and *PP v. Ong Kok Tan* [1969] 1 MLJ 118.

Another unsatisfactory feature of this case is the "evidence" (not properly such) which the learned Magistrate imparted into her judgment and which she gathered as a result of her, what I can term as, investigation by her revisiting the school on her own after the close of the case. As a result of her visit, which was made some two and a half years after the date of the alleged offences, she disbelieved the accused as to the visibility of the library and the class room to people in nearby building and locations. This is wrong and to show that it is, I need only refer to **Phipson on Evidence,** 14th Edn., at para. 2-08 which says:

> Although, however, judges and juries may, in arriving at decisions, use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess, they may not, as might juries formerly, act on their own private knowledge or belief regarding the facts of the particular case.

I need mention one other unsatisfactory feature of this case before I make my decision as regards this appeal. The learned Magistrate treated the evidence of PW3 that she saw the accused took the child to his van, which resulted in the alleged offence in the house, as corroboration of the evidence of the child. Such evidence is only corroboration of the child's evidence if the charge is for the offence in the house but, as mentioned earlier, the charge against the accused was in respect of the offence in the school.

Given the many unsatisfactory features of this case, the cumulative effect of which was to occasion a miscarriage of justice, I allow the appeal and set aside the conviction and sentence. However, there should be a retrial, which I so order, of the accused on the following three charges which shall be tried together by another Magistrate, *viz*:

> Pertama,
>
> Bahawa kamu, di-dalam tempoh masa antara bulan Januari 1991 hingga bulan Julai 1991, antara jam 7.15 pagi hingga 5.45 petang, bertempat dil Pusat Sumber dalam Sekolah Rendah Tanjong Batu Darat, dalam Daerah Tawau, di dalam Negeri Sabah, telah menggunakan kekerasan jenayah kepada Siti Salwa Bte Kamil, seorang gadis berumur 8 tahun, dengan niat mencabul yang boleh dihukum di bawah s. 354 Kanun Kesiksaan.
>
> Kedua,
>
> Bahawa kamu, di-dalam tempoh masa antara bulan Januari 1991 hingga bulan Julai 1991, antara jam lebih kurang 4.40 petang hingga 5.00 petang, bertempat di Bilik Darjah 2H di Sekolah Rendah Tanjong Batu Darat, dalam Daerah Tawau, di dalam Negeri Sabah, telah menggunakan kekerasan jenayah kepada Siti Salwa Bte Kamil, seorang gadis berumur 8 tahun, dengan niat mencabul yang boleh dihuhum di bawah s. 354 Kanun Kesiksaan.
>
> Ketiga:
>
> Bahawa kamu, di-dalam tempoh masa antara bulan Januari 1991 hingga bulan Julai 1991, antara jam lebih kurang 7.15 pagi hingga 5.45 petang dirumah kamu di Air Panas, dalam Daerah Tawau, di dalam Negeri Sabah, telah menggunakan kekerasan jenayah kepada Siti Salwa bte Kamil, seorang gadis berumur 8 tahun, dengan niat mencabul yang boleh dihukum di bawah s. 354 Kanun Kesiksaan.

There is just one final matter which I would like to draw the attention of the Judicial Officers of the Subordinate Courts in Sabah. The provisions governing the evidence of a child are s. 118 and s. 133A of the Evidence Act 1950 and these have to be read with the Oaths Ordinance (Cap. 89) of Sabah. This has the effect that when a child is allowed to give evidence not on oath or affirmation, the Court must caution the child "to speak the truth, the whole truth and nothing but the truth". As to the tests to be employed in ascertaining whether a child should give evidence on oath or affirmation or after caution, the case of *Kee Lik Tian v. PP* [1984] 1 MLJ 306, at pp. 308-309, provides valuable guides to which the Judicial Officers should refer to. That case also lays than that it is advisable to put on record as to what went on in the Court with regard to determination of whether a child should be allowed to give evidence.

INGEBACK (MALAYSIA) SDN. BHD.

v.

EAST WEST-UMI INSURANCE BERHAD & 2 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[GUAMAN SIVIL NO. D5-22-1025-90]
24 FEBRUARY 1994

PRACTICE AND PROCEDURE: Application for leave to intervene - Proper test - Whether proposed intervenors had rights and interests in the matter - Multiplicity of actions in respect of same transaction - Whether to be avoided.

The second and third defendants, (the proposed defendants) were developers of the Palm Court condominium project (the project) in Brickfields, Kuala Lumpur. In 1988 they entered into a contract with the plaintiff for the construction of the said project. The defendant, as insurers, executed a performance bond in favour of the plaintiff and guaranteed the plaintiff's performance in the construction of the project.

The proposed defendants alleged breach of contract against the plaintiff and claimed from the defendant RM2,984,944.30 under the performance bond. The plaintiff later applied for and obtained interlocutory injunction againt the defendant, restraining the defendant from paying the proposed defendants under the said performance bond. The result was that on 3 December 1992 the proposed defendants applied to set aside the injunction and a week later, on 11 December 1992, they applied to intervene in the matter.

The issue was whether under the circumstances the application to intervene ought to be allowed.

Held:

[1] The proposed defendants clearly had interests and rights in the matter to be intervened. It is also abundantly clear that the involvement of the proposed defendants is part and parcel of the dispute between the plaintiff and the defendant. As the delay in making the application had been satisfactorily exlained to the Court and as multiplicity of actions regarding the same transaction ought to be avoided, there is reason enough to allow the proposed defendants to intervene and be made parties to the action.

[Application allowed].